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A Short

**DISCOURSE**

OF

**High Treason,**

More especially on

**THREE CLAUSES**

OF THE

**STATUTE**

OF

**TREASONS;**

*Viz.*

1. Compassing the King's Death.
2. Levying War against the King.
3. Adhering to his Enemies.

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In the SAVOY:

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M DCC XLVI.





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A Short  
**DISCOURSE**  
 OF  
**High Treason, &c.**

*Sect. 1.* **T**HAT unhappy Situation to which many *British* Subjects have reduced themselves, (namely, to have their Honours, their Blood, their Lives and fortunes all at Stake upon their Trials for High Treason) has made it proper at this time, to publish this little Treatise concerning those Species of Treason, and the Questions probably to be made upon them, which are shortly to be the Objects of the publick Attention.

*Sect. 2.* By the common Law of *England* there was great Incertainty as to the several Species or Sorts of

Treasons. Besides those Offences which have been declared or enacted to be Treason by *Stat. 25 Ed. 3. ch. 2.* commonly called the Statute *de proditionibus*, many others (some of them of a low Degree, and others very loose and uncertain in their Description) had been adjudged High Treason. Of the first were violating the Nurse of one of the King's Children, killing the King's Messenger, &c. of the latter, accroaching Royal Power, in short almost every Offence that was or seemed to be a Breach of the Faith and Allegiance due to the King was by Construction, and Consequence, and Interpretation, raised into the Offence of High Treason. 1 *Hale Hist. P. C. ch. 11.*

*Sect. 3.* High Treason, in *Latin Proditio*, is an Offence that is more immediately against the Person or Government of the King. The Safety and Tranquillity of the Kingdom are highly concerned in the Preservation of the King's Person, his Dignity and Government. The Laws have therefore, under the severest Penalties, given them all possible Security. The Subject is, protected by the King and his

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his Laws, and in return is bound to bear true Allegiance to the King. Thence the Breach of this Allegiance is called *proditio*, and every Indictment for it, lays the overt Act to be done *proditorie*, as importing a Breach of that Trust which is due to the King; and also charges it to be *against the Duty of his Allegiance, and against the King's Peace, his Crown and Dignity*. Therefore an Alien Enemy, as such, invading this Kingdom, cannot be a Traitor; because he owes no Faith, he violates no Trust. He may be put to Death as an Enemy, by the Law of Nations, if a more moderate Course does not obtain between our Sovereign, and the Sovereign of such Invader.

*Sect. 4.* But if an alien *amy*, or even an Alien the Subject of an Alien Enemy, resides here and enjoys the Benefit of the King's Protection, he is capable of committing High Treason, and of being punished accordingly. The difference in the Indictment being that it shall stile the King only, *his Lord*; and not *his natural Lord*: but it shall conclude *against the Duty of his Allegiance*. *Hale's H. P. C. ch. 13.*

*Seft. 5.* This Business of Protection on the Part of the Prince, is said to give so high a Claim to Allegiance on the part of the Subject, that it has been observed by a Writer of very high Authority, that Treason against an Usurper in full Possession, in compassing his Death, has been punished by the true Prince on his regaining the Sovereignty, unless the Attempts were made in his Favour. But, saving the Authority of the Book, the Instance of *Ralph Gray* punished by *Ed. 4.* not only (says the Book) for his Rebellion against himself, but also because of his Perjury and Doubtleness which he had done to King *H. 6.* I say, this Instance does not come up to the Proposition intended to be proved. For, 1<sup>st</sup>, It appears that *Ralph Gray* was guilty of High Treason against *Edward* the 4<sup>th</sup>, and was punished for that; the additional Charge therefore of Perjury and Doubtleness to *K. H. 6.* is only Matter of Aggravation, to render the Criminal odious even to the Partizans of the House of *Lancaster*. 2. Our Author was too learned to suppose that the Punishment of High Treason could be regularly inflicted on



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on any Person upon a Charge of Perjury and Doubleness. It is sufficient to say that whether *Ed. 4.* acted as our Author supposes, or not, with respect to Offences committed against *Hen. 6.* it will not be doubted that *Hen. 6.* and his Father, and Grandfather punished Crimes committed against themselves during their Possession of the Sovereignty, and more especially the Crime of Treason in supporting the Claim of another Family.

*Sect. 6.* Allegiance is divided into, 1st, Original, which is antecedent to, or independent of any express Oath or Engagement, or, 2. Express, which consists in Oaths, &c. By the Breach of the first of these, the Crime of High Treason is constituted. And this Allegiance is either, 1st, Natural, which in all Times and Places binds all Subjects born within the King's Allegiance, or, 2. Local, which obliges Aliens, only during such Time as they reside within the King's Dominions, and enjoy his Protection. 7 Co. *Calvin's Case.* 1 Hale's *H. P. C. ch. 10.*

*Sect.*

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*Sect. 7.* I have said that natural Allegiance binds in all Times and Places, because nothing can be more certain than this Position, that a natural-born Subject cannot put off or discharge his Allegiance to his Natural Prince, by swearing Allegiance, or putting himself under the Protection of a foreign Prince: for, the natural Allegiance cannot be discharged, without the Consent of that Prince to whom it is due. *1 Hale's H. P. C. ch. 13. p. 96.* Nor is this a Notion peculiar to the Laws of *England*, or of *Great Britain*. *King Charles the XIIth of Sweden* acted by it in the Case of Count *Patkul*; and we may venture to appeal on this Head to the Law Writers of all the great Kingdoms and States in *Europe*. They all hold the same Doctrine, their Sovereigns all practise it, as they see Occasion; and a contrary Opinion can only prevail among Soldiers of Fortune, or Men who leave their Countries for Hardships on Account of Religion, or some other Cause of Discontent.

*Sect. 8.* It may be very true, that in the Wars of *King William*

liam and Queen Anne, against France, many Persons did bear Arms on each Side, against their Native Country, who being taken Prisoners, were treated as Prisoners of War, and not as Traitors; but this was owing to a Moderation, at that Time extremely necessary for the sake of Humanity: For, as great Numbers of the Subjects of Great Britain, especially Scots, and Irish Roman Catholics, had followed the Fortunes of King James the Second, and gone with him, or after him, into France, in like Manner, Multitudes of natural-born Frenchmen had, on the Revocation of the Edict of Nantz, taken Refuge in these Kingdoms on the Account of their Religion: The Armies of both Sides had such Numbers of Fugitives and Refugees, as to compose whole Regiments of them: So that Forbearance, with Respect to the Execution of the Laws of Treason upon such Persons, seems to have been mutually necessary at that Time. But it will hardly be found that the like Indulgence was extended to any who changed Sides, or chose new Sovereigns *flagrante Bello*;

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*Bello*; on the contrary, such Persons were always considered and treated as Traitors. Vide *Lindsay's Trial*, 3 *An. St. Tri. Vol. 5. p. 508, &c.* N. B. he was tried upon a new Act of Parliament against going into *France*.

*Sect. 9.* Having premised thus much concerning Treasons at the common Law, the general Notion of Treason, and the Nature of Allegiance original, or expressed, and natural, or local, we come now to that famous Statute 25 *Ed. 3.* which, for the Safety of the People, declared or enumerated the Crimes which should be deemed High Treason; taking no more of it than relates to the Offences which are now more particularly under an Examination, as follows: "*Item*, Whereas divers Opinions have been before this Time, in what Case Treason shall be said, and in what not; the King, at the Request of the Lords and of the Commons, hath made a Declaration in the Manner as hereafter followeth; that is to say, When a Man doth compass or imagine the Death of our Lord the King, or our Lady his Queen, or their el-  
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“ deſt Son and Heir; or if a Man  
“ do levy War againſt our Lord the  
“ King in his Realm, or be adhe-  
“ rent to the King’s Enemies in his  
“ Realm, giving to them Aid and  
“ Comfort in the Realm, or elſewhere,  
“ and thereof be provably attainted  
“ of open Deed, by People of their  
“ Condition; and in the Caſes above  
“ rehearſed, that ought to be judged  
“ Treason, which extends to our  
“ Lord the King and his Royal Ma-  
“ jeſty, and of ſuch Treason, the  
“ Forfeiture of the Eſcheats pertain-  
“ eth to our Lord the King, as well  
“ of the Lands and Tenements holden  
“ of others, as of himſelf.”

*ſect.* 10. There are three Branches  
of Treasons declared by this Statute,  
which we ſhall more particularly treat  
of; *viz.* 1ſt, The compaſſing the  
Death of the King, and declaring the  
ſame by an Overt-Act. 2. The le-  
vying War againſt the King. 3. Ad-  
hering to the King’s Enemies, and  
declaring the ſame by ſome Overt-act.  
As to four other Sorts, namely, Vio-  
lation of the King’s Conſort, his el-  
deſt Daughter unmarried, or the  
Prince’s Wife; counterfeiting the  
great

great or privy Seal, or the Coin, killing the Chancellor, &c. doing their Office, we shall not make any further Mention of them.

*Sect. 11.* Proceed we therefore to consider the first sort of Treason mentioned in this Statute, and which is indeed of the highest Degree, *viz.* compassing the King's Death; and here are to be considered, 1st, Who may be guilty of this Treason. 2. Who may be such a King against whom this Treason may be committed? 3. What is such a compassing or imagining his Death. 4. What Overt-act is sufficient Evidence of such compassing or imagining.

*Sect. 12.* As to the first Point, it has been already said, that all natural-born Subjects, and all Aliens, Friends or Enemies, living under the King's Protection, owe an Allegiance, either natural or local, and may be guilty of this Crime. 7 Co. 6. *Calvin's Case.* The principal and most difficult Question upon this Point is, What shall be done to an Alien, who being the Ambassador here of a foreign Prince, conspires against the Life of the King, or to raise a Rebellion against him.

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Some of the Civilians think he is not to be dealt with as a Traitor, but as an Enemy. Indeed it would be absurd to say, that the King's safe Conduct and Protection should defend him in acting contrary to the Duty of an Ambassador, and in his Endeavours to destroy the King that granted them. *Frustra Legis auxilium implo- rat qui in legem committit.* But others think more favourably, and that he is not to be punished by the Prince to whom he was sent; but is to be sent back to be punished by the Prince who sent him; and this hath more commonly obtained in Practice, chiefly to avoid the making of extreme Precedents, which might afterwards happen to be produced against the very Courts which made them: But this Temper among Princes is rather founded in Policy than in Justice.

*Sect. 13.* As to the second point a King *de facto* or King for the time being, is a King within this Statute. And no other Person but the King in Possession is, or can be, or ever was King of this Realm (or of *England* before the Union) so as to have the Benefit of the Laws of the Crown

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and Royal Prerogatives in his Favour. And this has been the Judgment of the Learned even in the Times of *Ed. 4.* who claimed to be King *de Jure.* 9 *Ed. 4. 1. b. Bro. Treason* 10, 32. and in the same Reign it was settled that all judicial Acts of *Hen. 6.* and Pardons and Denizations by him, while he was King, were valid. But where *Eward 4.* had granted a Pardon before he came to the Crown, and afterwards became actually King, that such Pardon was void. 9 *Ed. 4. 1. b. 2. a.* To this purpose is also *Stat. 11 H. 7. ch. 1.* Which declares that all Subjects are bound by their Allegiance to serve their Prince and Sovereign Lord, for the time being, in his Wars, for the Defence of him and his Land, against every Rebellion, Power and Might reared against him, &c. see the Statute. So that both by this Act, and the Judgment of Law before this Act, even in the Reign of a King who is supposed to have introduced the Distinction of King *de facto* and King *de Jure*, the Person in Possession of the Royal Stile, Title and Power is, and ever was the Person to whom Allegiance is due, and against whom  
Treason



Treason may be committed. As for King *Charles* the Second, the Judges after his Restauration resolved that he was King *de facto* as well as *de Jure*, from the Moment of his Father's Death; and certain it is, that if he was not, no body else was. I omit discussing other Questions which have been settled upon this Point, as that a titular King, the Husband of a Queen Regnant, is not within the Meaning of this Clause; but that the Heir or Successor of a King is within it, and that from the Death of his Ancestor, as also a Queen Regnant, because these Matters do not fall under Consideration upon the Occasion which in the first Page is alledged as the Motive for compiling this Discourse.

*Sect. 14.* As to the third Point, What is a *compassing* or *imagining* the King's Death within this Statute? This may be explained in equipollent Words of more common Use, as *going about*, or *contriving*. Whatever the *going about*, or *compassing* may be, or whatever external Act may be so called, most certain it is, that the *imagining* or *contriving* is merely internal, and

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an Act of the Mind, and could only have been cognizable by God; if not interpreted by some external Action. Well therefore is it ordained by this Statute, that the Criminal be thereof attainted, provably of open Deed, that is, I conceive, by good and sufficient Proof, which manifests that the Heart of the Criminal did imagine or contrive this Treason. But as this Statute which reduced Treasons to a Certainty, has ever since been esteemed a principal Bulwark of the Safety of the Subject, so the learned in the Law have in all times been laudably scrupulous in charging the Crime according to the Statute. Upon this Clause they do not charge the overt Act as the very Treason, but charge the Treason in imagining and compassing, and then lay the overt fact to prove and illustrate that Charge. By this Judgment of our Law that the Treason is in the Intention, and not in the Execution of the Act, the Person is guilty whose mind is guilty; he is guilty though he fails in the Attempt; he is guilty though he never could find his Opportunity to make the Attempt; he is guilty, and that Guilt shall

shall be deemed sufficiently proved, if he has done any open Act which proves that he intended it, as was said before. This properly carries us on to

*Seet. 15.* The fourth Point, *viz.* What is an overt Act within this Statute? If divers conspire the Death of the King, and consult of the manner, and thereupon provide Weapons, &c. for the Execution, this is such overt Act. *C. P. C. 12.* So if they only conspire and agree: for, the Consultation and agreement are open Acts. Lord *Stafford's Case, State Trials Vol. 3. 208.* *Charnock's Case, State Trials Vol. 4. 581.* therefore where Books say that Words alone do not constitute such overt Act, the Proposition is to be understood with a Distinction between Words which only import an Affirmation or Negation, and Words which tend to Action. This Difference is well warranted by several adjudged Cases, for which see *Hale's H. P. C. ch. 13.* The several Acts of Parliament which have made certain Affirmations or Negations to be Treason, are so far from overthrowing this Difference, that they establish the same,

and it is highly perillous to disaffected Persons if they give too much credit to the Opinions of private Men, who have written Comments to the contrary.

*Sect.* 16. Conspiring with a foreign Prince to invade the Kingdom, is such an overt Act. *Dr. Storie's Case.* 13 *Eliz. Dyer.* 298. *b.* Conspiring the Death of Queen *Elizabeth* and meeting to consult of the manner how to effect it. 1 *And.* 104. See *Layer's Trial.* Assembling to levy War against the King to depose, or restrain him, or to enforce him to any Act, the Earl of *Essex's Case temp. Eliz.*

*Sect.* 17. A levying War, *i. e.* a rising in Arms to reform Abuses, perhaps may not constitute this Overt Act; but may be construed only the Treason contained in the Clause of levying War: unless such War happens afterwards to grow into a direct War against the King; as it may, by their fighting the King's Forces sent to suppress them.

*Sect.* 18. It may be proper in this Place to observe, that the Impeachment of the Earl of *Derwentwater* and six other Lords, by the House of Commons, 2 *Geo.* 1. to

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which the said Earl and the rest of the Lords (save one) pleaded *Guilty*, was for imagining and compassing the Death of the King; and the Overt Acts laid are, 1. Agreeing, Conspiring and resolving to levy War against the King, to depose and murder him, and to deprive him of his Royal State, Crown and Dignity. 2. Assembling to raise Rebellion, with great Quantities of Arms, &c. and forming an Army of the King's Subjects, in order to wage War in Favour of the Pretender, and levying War against the King, and in an hostile Manner marching through and invading several Parts of the Kingdom, and unlawfully seizing Horses, &c. of many good Subjects, and Guns, &c. for carrying on their traiterous Purposes. And 3. Causing the Pretender to be proclaimed as King of these Realms, and seizing the publick Money for the Pretender's Use, and causing the Pretender to be prayed for as King of these Realms. 4. Seizing the Town of *Preston*, and fighting the King's Forces there, and causing a horrid Slaughter of many faithful Subjects. So that here are  
laid

laid, 1st, The conspiring to levy War. 2. The assembling for that Purpose, and seizing Goods and Arms. 3. The avowing the Royalty of the Pretender: And 4. The consummate Act of War, viz. Fighting the King's Forces, and slaying his faithful Subjects. *St. Tri. Vol. 6. p. 6, 7, 8, 28.* It may be further observed, that the Lord High Steward (Lord Cowper) in his Speech to the Lords the Prisoners, introductory to the pronouncing Judgment, tells them, their Crime is an Attempt to destroy the King; and hence he infers as a natural Consequence, the Ruin of the whole Fabrick, and razing the very Foundation of the Government, and bringing a lasting and universal Destruction on the whole Kingdom. To destroy the King, says he, is a Construction of Law on their Actions, and this is not only true in the Notion of Law, but almost always so in Deed and Reality. 'Tis a trite but very true Remark, that there are but a few Hours between Kings being reduced under the Power of Pretenders to their Crown, and their Graves. *Ibid. p. 15.*

*Sett.*



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*Sect. 19.* On the Impeachment of the Earl of *Winton*, Sir *Joseph Jekyll*, one of the Managers for the House of Commons, shews that the levying War is laid in the Impeachment as an Overt Act of imagining and compassing the King's Death; and also, that the levying War is charged as a second Species of Treason, and that the Overt Acts are the forming an Army, marching in an hostile Manner, seizing a Town, and fighting with the King's Forces. *St. Tri. Vol. 6. p. 28.*

*Sect. 20.* In the Trial of *Francis Francia*, upon an Indictment, compassing and imagining the King's Death, is the Treason laid, and the Overt Acts are conspiring to levy War against the King in favour of the Pretender; conspiring and agreeing to solicit and procure Assistance from Foreigners, to carry on that War, and writing Letters to require such Assistance. *St. Tri. Vol. 6. p. 60.*

*Sect. 21.* The Indictment of *Christopher Layer* is for High Treason, upon the same first Branch, viz. compassing and imagining the King's Death. The Overt Acts are conspiring  
and

and agreeing to levy War against the King, and for that Purpose publishing a traiterous Writing, purporting an Exhortation and Promises of Reward, to persuade the Subjects to levy War against the King, for the traiterous Purposes aforesaid; and conspiring, by an armed Force, to exalt the Pretender to the Royal Dignity, and retaining Men to levy War against the King, for the Purposes aforesaid; and conspiring to take and imprison the King. This is the last of the Trials which is in Print, for any Case of High Treason.

*Sect. 22.* These Instances shew how extensive this first Branch of Treason is in its Nature; and although levying War is, doubtless, a substantive Branch of High Treason in itself, yet there can be no Inconvenience in allowing it to be an Overt Act of the first Species, *viz.* of imagining and compassing the King's Death, especially since *Stat. 7 W. 3. c. 3.* by which it is enacted, that "No Evidence  
" shall be admitted or given of any  
" Overt Act, that is not expressly laid  
" in the Indictment against any Person or Persons whatsoever." *Note,*  
on



on *Laver's* Trial, it was allowed to give Evidence that he had been at *Rome*, and corresponded with the Pretender, as a further Evidence of the Overt Acts laid in the Indictments, some of which were conspiring to raise the Pretender, by an armed Force, to the Crown, and for that Purpose to depose the King: though on Behalf of the Prisoner it was strongly urged, that such Correspondence is made High Treason by *Stat 13 & 14 W. 3.* and not being laid in the Indictment, ought not to be proved on this Trial. *St. Tri. Vol. 6. p. 287.* on that Trial, the Overt Acts in *Essex*, from which County the Jury came, were, consulting to secure the King, and publishing a Declaration for a Rebellion, and this proved but by one Witness: these were held sufficient Overt Acts, and intitled the Crown to prove other Overt Acts of the same Species of Treason in other Countries by other Witnesses.

*Sect. 23.* As to the next Offence of levying War, it hath been so frequently made, in the framing of Indictments, the Overt Act to support the Charge of Treason in imagining and compassing the King's Death, that it hath

hath caused an Objection to be made, that it is a redundant and useless Article in the Statute 25 *Ed.* 3. for, say the Objectors, if every Intention of levying War doth imply an Intention to kill the King, or in other Words, to be an Overt Act of imagining and compassing his Death, there was no Need of making the levying of War, a distinct Species of Treason; for it was comprehended in the former: But this Argument is improperly put, by supposing a Proposition which is not maintained by any Body, *viz.* that every Intention of levying War, implies an Intention to kill the King. It was never maintained, for Example, that a Rising to pull down all Inclosures, or to pull down all Bawdy-houses, implied an Intention to kill the King. Lord Chief Justice *Hale* says, it seems not to be an Evidence of an Overt Act to prove the compassing the King's Death, when it is so disclosed upon the Proof, or if it be particularly laid in the Indictment; though *primâ facie*, if it be barely laid in the Indictment, as a levying War against the King it is a good Overt Act to serve

serve an Indictment of compassing the King's Death, until upon Evidence it shall be disclosed to be only to the Purpose aforesaid, and so only an interpretative or constructive levying of War: Yet this levying of War may become a direct War against the King, as by fighting his Forces, as has been said before.

*Sect. 24.* But it is proper to consider this Branch of levying War as a Substantive Treason in itself, and to make it such, there are three Requisites upon the very Words of the Statute. 1. Levying of War. 2. Against the King. 3. In his Realm. That is, 1. The Act to be done. 2. The Person against whom to be done. 3. The Place where to be done.

*Sect. 25.* As to the Act, the assembling of many Rioters if they be not arrayed in a warlike manner, nor march in Posture of War, doth not make this levying of War. Again, A Consultation to levy War and provide Weapons, may amount to an overt Act of the first Species of Treason, viz. compassing the King's Death, and yet not amount to the levying of War, there being no War actually levied.

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vied. *C. P. C. 9.* As to the second requisite, it must be against the King, otherwise

*Sect. 26.* Though War be levied in a warlike manner, it will not be Treason. As formerly when the Barons were very powerful, they have marched with Forces against each other in a warlike manner; or where a great Number of armed Persons riotously assemble to redress a private Wrong, as to pull down a particular Inclosure, this is but a great Riot.

*Sect. 27.* The Wars which within this Clause shall be said to be levied against the King, are therefore either those which are directly against his Person or his Armies, to depose, or imprison, or otherwise injure him, or those which by Construction are against him, *viz.* levied to reform Abuses, as to alter Religion, to raise the Wages of Servants or Labourers, to throw down Inclosures generally. These, and the like Instances, are War against the King, and Treason within this Clause of the Statute *C. P. C. 10.* for in these and such like Instances, the Offenders take the royal Power into their own Hands.

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*Sect.* 28. If many conspire to levy War, and only some of them levy it, all that conspired are guilty of High Treason: For, here is a War actually levied, and all are principals in Treason. *Kelynge* 19.

*Sect.* 29. The Case of a great Number of People 20 *Car.* 2. *Kely.* 70, &c. was, a hundred or more assembled, armed, and marched in a warlike manner with a Banner displayed to pull down Bawdy-Houses, all the Judges except *Hale*, held it High Treason within this Clause of this Statute, and several of the Offenders were executed accordingly.

*Sect.* 30. It is not improbable that if the Crown had been as able to prove the Intentions as the Actions of these Men, they might as justly have been punished upon the first Clause of that Statute, as upon the second: For, if the Devisers and fomenters of that Disorder could have seen the Matter proceed without Interruption for a few Days, they doubted not to have encreased the Numbers to thousands, and have carried their Work of Reformation to *Whitehall*, where the King then resided.

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*Señ. 31.* It is remarkable that the Makers of this Act of Treasons were apprehensive there might be some Danger of extending this Clause of levying War too far by Construction, therefore in the same Statute they have declared, that if any Men ride armed secretly, with Men of Arms, against any other, to slay, rob, take, or detain him till he has made Fine, or Ransom, or had his Deliverance, it shall not be judged Treason, but shall be judged Felony, or Trespass, according to former Laws, and as the Case requires.

*Señ. 32.* It is necessary to remember, especially at this time, that if War be levied against the King, and others bring them Relief of Victuals for fear of Death, and retire as soon as they are able, this is not a levying of War. *C. P. C. 10.* It seems the Law would be the same in case they had been compelled by Force to march with such Rebels; for that purpose see the Earl of *Winton's* Trial, *State Trials* Vol. 6. where he is called upon by the Managers, and the Lord High Steward, to shew that he was uneasy at marching with the Rebels, or compelled

pelled to stay with them. It also appears there, that a Party of *Highlanders*, about 500, went off at the Borders of *England* and *Scotland*, and nothing, except his own Inclination, hindered his departing along with them; for, he went alone to them to perswade them to continue their Progress Southward, along with the rest of the Rebel Army, and not prevailing with them, he left them, and returned to that Body which was marching into *England*.

*Sect. 33.* Going in a warlike manner, armed, to the number of 300 to surprize the Archbishop of *Canterbury*, who was a privy Counsellor, was held Treason by all the Judges of *England*.

*Sect. 34.* And at the same time, ten of the Judges agreed, that breaking a Prison where Traitors are confined, and causing them to escape, is Treason, although the Prison-breakers did not know that there were any Traitors there. *Cro. Car. 583. W. Jones 455.*

*Sect. 35.* Where Apprentices in *London* assembled, and marched armed, and in a warlike manner to break

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Prison and deliver others out of Prison, and kill the Lord Mayor, and offered Violence to the Sheriffs and others who resisted them, it was adjudged High Treason upon *Stat. 13 Eliz.* for intending to levy War against the Queen, although they did not intend any Evil to the Person of the Queen, and several of them were executed. 2 *And. 2.*

*Sect. 36.* Holding with Arms, a Fort against the King and his Power, is a levying War against the King within this Act, *C. P. C. 10.*

*Sect. 37.* So fortifying a House purposely to oppose the King or his Forces, is a levying War against the King.

*Sect. 38.* If the King's Soldiers in the time of Hostility or Rebellion in the Kingdom, be assaulted as Enemies, either upon their March, or in their Quarters, this is a levying War against the King upon *Stat. 25 Ed. 3.* But if upon some Injury done by the Soldiers, or upon some sudden falling out, the Countrymen rise upon them, this is not a levying War against the King, unless it be intended for the Cover of some traiterous Design: but



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it may be a great Riot, or Felony in the Assailants if they kill any Person.

*Sect. 39.* Where a great Number of Weavers, *viz.* 1500, rose to destroy Engine-Looms, and did destroy many in several Counties, and other Goods of the Master-Weavers, and refused to depart upon Proclamation, and affronted the Magistrates, and were armed with Staves, Hammers, and such like Instruments, but no other Weapons. Five Judges thought this a Treason upon the Clause against levying War; or upon a *Stat. 13 Car. 2.* the other five Judges did not concur, therefore they were prosecuted only as Rioters.

1 *Hale's H. 143.*

*Sect. 40.* *The Place* is the third thing considerable as to this Offence of levying War against the King; and this is to be in his Realm.

*Sect. 41.* Some say that the narrow Seas are comprehended within the Realm, for, say they, the narrow Seas are of the Ligiance of the Crown of *England.* This Argument does not seem conclusive. *Ireland* is of the Ligiance of the Crown of *England*, and yet a Treason committed there,

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there, is not committed within the Realm of *England*.

*Sect. 42.* But if the Construction of the Statute is such, as to the narrow Seas, it is next considerable where the Trial is to be; and it is said it shall be in the County next adjacent to the Coast, by an Indictment found by Jurors for that County, before special Commissioners of *Oyer and Terminer*. *v. 5 R. 2. Trial 54.* or before the Court of King's Bench. *40 Ass. 25.* But if it were held that the Seas were not within the Realm, the Offence would be triable in any County the King should appoint, by Force of *Stat. 28 H. 8. ch. 15.* or *35 H. 8. ch. 2.*

*Sect. 43.* By *Stat. 32 H. 8. ch. 4.* All Treasons or Misprisions of Treasons, committed in *Wales*, may be presented and tried in such Shires, and before such Commissioners as the King shall appoint in like manner as if the Facts had been committed in such Shires. *Q.* If this be in force.

*Sect. 44.* By *Stat. 35 H. 8. 2.* All manner of Offences, being then already made or declared, or after to be made or declared, by any of the  
Laws

*of High Treason.* 33

Laws and Statutes of this Realm, to be Treasons, Misprifions of Treasons, or Concealments of Treasons, and committed by any Person or Persons, out of this Realm, shall be inquired of, heard and determined before the King's Bench, by good Men of the Shire where the King's Bench sits; or before such Commissioners in such Shire as shall be assigned by the King's Commission by lawful Men of the same Shire, as if such Crime had been committed in the same Shire.

*Sect. 45.* Statute 19 *Geo. 2.* reciting (among other Things) the present Rebellion, enacts, that all who are or shall be on or before the first of *January* 1746, in actual Custody, for the said Rebellion and High Treason, may be proceeded against for the said Treasons, before such Commissioners of *Oyer and Terminer*, or Gaol-Delivery, in such Counties or Shires of this Realm, as shall be assigned by the King's Commission under the great Seal, by good Men of the same Counties or Shires respectively, as if the Treasons had been there committed.

*Sect.*

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*Sect. 46.* If any Indictments against such Offenders be found in the County or Shire where the Offence was committed, the Offenders may be proceeded against on such Indictments for such Treasons, before such Commissioners, &c. and in such County, &c. as shall be assigned by the King's Commission, &c. by good Men of the same Counties, &c. and such Indictments shall be certified to the Commissioners by *Certiorari*, and no Challenge for the County, Shire or Hundred, to be allowed, but Challenges for want of Freehold in the same County where Trial, and all other due Challenges shall be allowed.

*Sect. 47.* By the same Act, Peers indicted, are to be tried by their Peers.

*Sect. 48.* This Act is not to alter the Place of the Indictment or Trial, unless the Person indicted, &c. be proved to have been actually in Arms, or to have personally joined with others, while in Arms, in the Rebellion or War charged in the Indictment; on Failure of such Proof, the Person to be acquitted, to the same Intents only, as he should have been



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been, if this Act had not been made.

*Señ. 49.* And to remedy Difficulties in Trials for High Treason, and Misprison of Treason, in *Scotland*, with respect to Qualifications of Jurors there, it is also enacted, that in all Times hereafter, every Person may be summoned and returned to be a Jurymen in Trials for High Treason, and Misprison of Treason, in *Scotland*, who shall at the Time of such Trial be possessed in his own Right, or in the Right of his Wife, of Lands or Tenements, as Proprietor or Life-Renter within the Shire, Stewartry or Place where such Trial shall be, or from whence the Jury is to come, of the yearly Value of forty Shillings sterling, at the least, or valued at thirty Shillings sterling *per Annum*, in the Tax-Roll of the same Shire or Stewartry; and for want thereof, or for other lawful Cause, may be challenged. *See the Act at large.*

*Señ. 50.* The next Branch, and the last which we shall now consider of the Statute 25 *Ed. 3.* of Treasons, is that which relates to those who aid the King's Enemies in his Realm, giving

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giving them Aid or Comfort in his Realm, or elsewhere.

*Sect. 51.* The King's Enemies are Foreigners; for, Rebels are not Enemies, but Traitors. And with respect to Foreigners, it is not necessary that a War be solemnly denounced; for there are many Instances of Wars which have not been solemnly denounced or proclaimed, and yet they were very Wars; and adhering to such Enemies is Treason, within this Branch of the Statute.

*Sect. 52.* And further, if the Subject of a foreign Prince or State, whose Sovereign is at Amity with our King, makes War upon our King, Adherence to such Foreigner making War, is High Treason; for such Foreigner is an Enemy. See *1 Hale's H. P. C. ch. 15.*

*Sect. 53.* Foreigners adhering to their Prince in War with ours, are not within this Statute, unless under our King's Protection.

*Sect. 54.* Nor Subjects of *England*, who happen to reside in the Country at War with us, unless they assist in the War, or refuse to return home, upon privy Seal, or upon Proclamation

tion and Notice thereof, and this Refusal only, seems to be an Evidence of Adherence. *Ibid.*

*Sect. 55.* If a foreign Prince be in Amity with ours, yet if a Subject solicits by Letters such foreign Prince to invade this Realm, he is guilty of High Treason; but perhaps more properly under the first Branch, *viz.* of compassing the King's Death, than under the last Branch of adhering to the King's Enemies.

*Sect. 56.* A *British* Subject being taken Prisoner by an Enemy, swears Fealty to him, if done voluntarily, it is an adhering, &c. but if done for Fear of his Life, and he returns as soon as he may to his natural Allegiance, it is not an Adhering.

*Sect. 57.* Giving up a Fort, &c. treacherously, is an adhering, &c. but if the Surrender was by Imprudence or Cowardice, it is rather an Offence against martial Law. See *1 Hale's H. P. C. c. 15.*

*Sect. 58.* By Statute 7 *Anne, ch. 21.* from the 1st of July 1709. Crimes which are High Treason or Misprision of Treason in *England*, shall be construed such in *Scotland*; and none

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shall be such in *Scotland*, but what are so in *England*; and after that Time, the King may issue Commissions of *Oyer and Terminer* in *Scotland*, under the great Seal, three of the Lords of the Justiciary to be in the Commission, whereof one to be of the *Quorum*, to inquire of, hear and determine such Offences in such Manner as is used in *England*. There are many other Provisions in this Statute, for which, see the Act at large.

*Seet. 59.* As Commissioners of *Oyer and Terminer* and Gaol-Delivery, are the Persons who most usually take Cognizance of Offences of this Nature upon extraordinary Occasions, it may be acceptable here to say something of each of these Judicatures.

*Seet. 60.* The Court of King's Bench is the supreme and ordinary Court of *Oyer and Terminer*.

*Seet. 61.* Justices of *Oyer and Terminer* specially so called are by Commission. This Commission is usually granted to the Justices of Assize in their Circuits, and others named with them to enquire by the Oath, &c. of Treasons, &c.

*Seet.*



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*Seet. 62.* Commissioners of *Oyer and Terminer* before their Sessions, issue a Precept to the Sheriffs. See the Form, *Rast. Ent.* 443. *b.* There may be a Commission of Association of others to them, and Writs to admit them.

*Seet. 63.* They may continue their Commission by Adjournment; but if they sit without Adjournment, their Commission is determined; and it is fittest to enter their Adjournments on Record, and sometimes necessary.

*Seet. 64.* Issuing a new Commission of the same Nature in the same County, and notice thereof, determines their Commission, so does a *Supersedeas*, unless it be renewed by a *Procedendo*.

*Seet. 65.* Their Precept issues to the Sheriff fifteen Days, at least, before their Session, by three Commissioners, at least, *Quorum unus*, under their particular Seals, by which they command him to return twenty-four good Men for a Grand Jury at such a Day; and the Sheriff is to return his Panel annexed to the Precept.

*Seet. 66.* Regularly they do not proceed upon Indictments taken be-

fore other Courts, unless taken before other Commissioners of *Oyer and Terminer*, or unless their Commission be special for that Purpose. See *Stat. 1 Ed. 6. c. 7.* and the *Stat. 19 Geo. 2. supra.*

*Sect. 67.* When a Traitor, &c. pleads to an Indictment before them, they do not award a Precept to the Sheriff *ore tenus*, to return a Jury, (as Justices of Gaol-Delivery do,) but they make it in Writing under their Seals, or the Seals of three of them *Quorum unus.*

*Sect. 68.* The Proceedings before Commissioners of *Oyer and Terminer* may be very expeditious; for after the Time allowed between the issuing of their Precept, summoning the Grand Inquest, and their actual Session, they may go through the rest of the Proceedings in one Day, *to wit*, preferring the Indictment, joining Issue, making a Precept for a Petty Jury, the Return of it, the Trial and Judgment. But in the Cases of Treason comprehended within *Stat. 7 W. 3.* this is altered; for, by that Statute, 1. The Prisoner is to have a Copy of his Indictment  
five

of High Treason. 41

five Days before the Trial; therefore the Finding and the Trial must be at least five Days asunder. And, 2. The Prisoner is to have a Copy of the Panel of the Petty Jury, two Days before the Trial; therefore the making the Precept, and Return of it, and the Trial require more than two Days.

*Sect. 69.* All their Precepts and Processes are to be in the Names, and under the Seals of the Commissioners, or three of them, whereof one to be of the *Quorum*. Tho' in a little Book intitled, *A Form and Method of Trial of Commoners in Cases of High Treason, and Misprision of High Treason, &c.* it is directed that four such Commissioners join; and 'tis said this Book was published by the Approbation of the Judges of *England*, for the Assistance of Judges in *Scotland*, after the Union, in Cases of Treason; the Laws of *England* concerning Treason having been introduced into *Scotland* by *Stat. 7 Anne*, and the Laws of *Scotland* on that Head in a great Measure repealed. But it does not seem that this Necessity for four Commissioners to join has been made

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by any Act of Parliament; we may therefore be at Liberty to guess that this Number was supposed to be made requisite by the Terms of the Commissions to be issued.

*Sect. 70.* Special Commissions of *Oyer and Terminer* may be made for special Offences; and without the Aid of an Act of Parliament, it hath been practised in the Case of Treason, that where an Indictment was taken before Justices of *Oyer and Terminer* in the proper County, a special Commission has issued to determine that Indictment in another County; but then the Trial must be by a Jury of the County where the Offence was committed. See *Sect. 45, 46.*

*Sect. 71.* Justices of Gaol-Delivery are by Commission under the great Seal directed usually to five, or any two of them, *Quorum unus, &c.* to deliver the Gaol in such a County, of the Prisoners there: these Justices issue a Precept to the Sheriff, among other Things, to return Grand Juries and Petty Juries, and to proclaim the Gaol-Delivery.

*Sect. 72.* Justices of Gaol-Delivery may take an Indictment, and proceed



to the Trial and Judgment on the same Day, except in such Cases of Treason as are within *Stat. 7 W. 3. ch. 3. supra*, §. 67.

*Sect. 73.* These Justices may command the Sheriff *ore tenus*, without any Precept in Writing, to return a Jury. They may deliver Prisoners by Proclamation, where no Indictment is found; and may take Indictments of such Criminals as are in Gaol; and as they usually have the several Power of *Oyer and Terminer*, Gaol-Delivery, and the Peace given in their Commissions, they always make up their Records by Virtue of all their Powers; and so have the Benefit of all the Commissions to prevent Error.

*Sect. 74.* Judges of Gaol-Delivery may take Indictments of high Treason against Persons in Gaol, and proceed to Trial and Judgment. *4 Inst.* 169. They may give Judgment, or award Execution upon a former Conviction, or a former Judgment. *15 H. 7. 5. b. Stat. 1 Ed. 6. ch. 7.*

*Sect. 75.* The Justices of Gaol-Delivery or of the Peace, may in open Session reform all Panels returned before them, by putting out, and putting in

in Names of Persons. The Command is *ore tenus*; therefore if the Prisoner challenges off so many that there do not remain a sufficient Number of the Panel, as he may twenty peremptorily, or without Cause, in Felony, and thirty-five in High Treason, and as many as he can, for Cause; yet before Justices of Gaol-Delivery, it will not avail him: for, the Sheriff by the verbal Direction of the Court immediately enlarges the Panel.

*Sect. 76.* Having briefly taken a View of the Crimes proposed to be considered, and of many Resolutions concerning them, and of the Courts where they most probably will be tried (in the Case of Commoners) we shall now say a little concerning the Method of Trial of Peers.

*Sect. 77.* The Trial of a Peer, may be upon Indictment, or Impeachment, and in each Case before the Whole Body of temporal Lords of Parliament. If a Peer be tried by Impeachment, he cannot have the Benefit of *Stat. 7 W. 3. ch. 3.* Which allows the Prisoner many Advantages for his Defence, which he had not at common Law; the most considerable  
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of them, in the Case of a Peer, is the Assistance of Counsel to make his full Defence. The case of impeachments is excepted in the Statute, and accordingly on the Earl of *Winton's* Trial, 2 *Geo.* 1. though he was early allowed Counsel to assist him to prepare his Answer, yet on the Trial they were not allowed to compare the Evidence, or to reason upon Facts, nor to argue any Question or Doubt in Law, unless his Lordship would first propose the Point. The Solemnity of the Trial of a Peer, upon an Impeachment, may be there read. *State Trials Vol. 6. near the beginning.*

*Sett.* 78. If an Indictment be against a Peer for a Capital Offence, it shall be removed to the House of Peers by a Writ of *Certiorari*, and there the Proceedings shall be upon it, if the King appoints an High Steward. All the temporal Peers of *England* are Judges, and the sixteen who sit for *Scotland*, and all the Peers of *Great Britain*, which have been made since the Union. A Peer cannot waive his Trial by his Peers, and put himself upon a Jury. If he will not  
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put himself upon his Peers, Judgment shall be given against him as a Traitor. 2 *Rush.* 94. Lord *Audley's* Trial.

*Seet.* 79. By the Common Law, twelve Peers at least ought to be present, and find the Prisoner guilty, but if more Peers be present, the Verdict is to be by the Majority, so that twelve at least agree to it; therefore before the *Stat.* 7 *W.* 3. *ch.* 3. it was usual to have at least twenty-three Peers on a Trial. There were twenty-seven on Lord *Audley*, for several Felonies in the Reign of King *Charles* the first. But now by this Statute all the Peers shall be summoned at least twenty days before the Trial, and every one appearing, shall have a Vote, having taken the Oaths, &c.

*Seet.* 80. A Peer cannot challenge a Peer as his Judge, or Trier, although he was one of the Commissioners of *Oyer and Terminer*, before whom the Indictment was found. *Moor* 621, 622. *Keil.* 54, 58.

*Seet.* 81. The Lord Steward, after Verdict given, may take time to advise upon it, for any point in Law; and his Office continues until his giving Judgment: and yet it is but a Com-



Commission *pro hac Vice.* 2 *Rush.* 95.

*Sett.* 82. The Peers, if they have any Doubt among themselves, as to matter of Law, propose it to the Lord High Steward, and may also have the Opinion of the Judges upon it, in the Presence of the Prisoner, and if he desires it, he may be heard by his Counsel before the Judges give their Opinion upon the Point. *Vide Lord Mobun's Trial, State Trials Vol. 4.* But the Peers give their Verdict in the Absence of the Prisoner, who is afterwards brought to be informed of the same, and to receive Judgment; which the Lord High Steward pronounces in the same Form as in the King's Bench; he then breaks his Staff or Rod, and declares his Commission determined, and it is determined accordingly.

*Sett.* 83. The *Stat. 7 W. 3. ch. 3.* which has been often mentioned already, recites, that it is most just and reasonable that Persons prosecuted should not be debarred of all just and equal Means for Defence of their Innocencies, and enacts that any Person indicted for High Treason, whereby any Corruption of Blood may be made,  
or

or for Misprision of such Treason, shall have a Copy of his Indictment five days at least before the Trial, (but not the Names of the Witnesses) his Agent requiring the same, and paying a Fee not exceeding five Shillings. And may make his Defence by Counsel, and by Witnesses upon Oath. The Court are to assign him two such Counsel as he shall name, and they shall have Access to him at all seasonable Hours. *N. B.* the Examination of Witnesses upon Oath, is enlarged to all Trials of Treason and Felony, by *Stat. 1 Anne, ch. 9.*

*Sect. 84.* By the same Statute 7 *W.* 3. no Person is to be indicted, tried, or attainted for such Offences, but upon the Oaths and Testimony of two lawful Witnesses, either both to the same Overt Act, or one to one, and the other to another Overt Act of the same Treason; unless the Party willingly, without Violence, in open Court confesses the same, stands mute, or refuses to plead, or in case of High Treason, challenges peremptorily above thirty five of the Jury. Where a Party outlawed may come in and be tried, he shall have the same Ad-

vantages. If two distinct Heads of Treason be laid in one Indictment, and one Witness to one of them, and another to the other, it shall not be sufficient.

*Sect. 85.* No Person is to be prosecuted for the Treasons, &c. in 7 *W. 3. ch. 3.* unless the Indictment be found by a Grand Jury within three Years after the Offence committed, except a Design, Endeavour, or Attempt to assassinate the King. Q. Whether this does not extend to his Successors? Prisoners are to have Copies of the Panel of the Jurors two Days before the Trial. It has been resolved, that this Copy need not contain the Additions of the Jurors, see *Layer's Trial*: They shall also have the Process of the Court to compel Witnesses to appear; for more Matter see the Act at Large. It does not extend to Treasons relating to the Coin or Great or Privy Seal, Sign Manual, or Signet; nor to Proceedings in Parliament; but see *Sec. 82. ad finem* and the *Earl of Winton's Trial, State Trials Vol. 6. p. 22.*

*Sect. 86.* The Pretender stands attainted of High Treason by *Stat. 13*  
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and 14 *W. 3. ch. 3.* and holding Correspondence with him, or any employed by him is made Treason by the same Act, and Trial given in any County, if Offence committed out of the Realm. The like Law as to corresponding with his Sons, 19 *Geo. 2.* and for attainting them if they land or attempt to land in *Great Britain* or *Ireland*; and for Offence committed out of the Realm to be inquired of and tried in such Counties or Shires as the King by his Commission shall appoint.

*Sect. 87.* By *Stat. 1 Geo. 1. ch. 16.* *Henry Viscount Bolingbroke*, was required to render himself at or before the 10th of *September 1715.* in Default thereof to be thenceforth attainted of High Treason, and by *ch. 17.* of the same Session, *James Duke of Ormond* was required to render himself by the same Day, under the like Penalties for Default. But as the last of these is dead, and the former has been restored to his Country (though not to his Honours) by Act of Parliament; these two Statutes are become of the less Moment.

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*Sect. 88. By Stat. 1 Geo. 1. ch. 32.*  
*John Earl of Mar, William Murray Esq; commonly called Marquess of Tullibardine, eldest Son and Heir apparent of John Duke of Arbol, James Earl of Linlithgow, and James Drummond Esq; commonly called Lord Drummond, eldest Son and Heir apparent of the Earl of Perth,* are attainted of High Treason from the 19th day of *January 1715.* and by *ch. 53. of the same Session, Thomas Foster the younger Esq; and William Mackintosh Esq; (commonly called Brigadier Mackintosh)* are attainted of High Treason from the 12th Day of *November 1715.* Note, The Persons attainted by these two Acts, had no Day given to render themselves, for Reasons mentioned in the Preambles.

*Sect. 89. By Stat. 1 Geo. 1. ch. 42.*  
*George, Earl of Marischal, William, Earl of Seaforth, James, Earl of Southesk, James, Earl of Panmuir, William, Viscount of Kilsyth, James, Viscount of Kingston, Robert, Lord Burleigh, Kennet, Lord Duffus, and forty-three other Persons,* are required to render themselves to a Justice of

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Peace, on or before the last day of *June* 1716, or in Default thereof, are to be attainted from the 13th Day of *November* 1715. And many Persons have been required to render themselves by a Statute of the present Session of Parliament, see the Act, which is already in print. The Day given is the 12th Day of *July* 1746. There are three Peers, and forty-one other Persons.

*Seet.* 90. In the beginning of this Rebellion, an Act was made to empower his Majesty to secure and detain such Persons as he shall suspect are conspiring against his Person, and Government. That Act was to have continued until the 19th of *April* 1746. But by another Act, it is to continue from the 19th of *April* until the 20th Day of *December* 1746. Q. Whether upon the Terms of the two Acts anyailable Person might not on the 19th Day of *April* have brought his *Habeas Corpus*, and legally insisted on being bailed? the Words *until* such a Day and *from* such a Day, are both exclusive of the Day.

A

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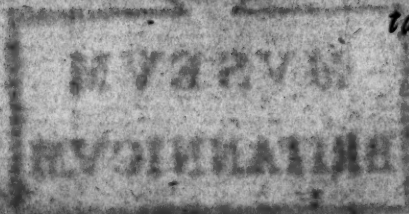
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- Sect. 78. Trial of a Peer by Indictment.
- Sect. 78, 79. By how many Peers, formerly, and at present.
- Sect. 80. A Peer cannot challenge a Peer his Trier.
- Sect. 81. Lord High Steward continues until Judgment given.
- Sect. 82. How the Peers give Verdict. Conclusion of such Commission.
- Sect. 83. Stat. 7 W. 3. ch. 3. allows Prisoner Copy of Indictment, Defence by Counsel, and Witnesses upon Oath.
- Sect. 84. Requires two Witnesses in Treason, except certain Cases.
- Sect. 85. Limits the Time for finding Indictments of Treason, except for Plot to assassinate the King.
- Sect. 85, 68. Prisoner to have Copy of Panel two Days before Trial.
- Sect. 86. Pretender and his Sons attainted,



# T A B L E.

*attainted, and they who correspond with them.*

*Sect. 87. Day given to the late Duke of Ormond and Lord Bolingbroke, to render themselves in 1715, or be attainted.*

*Sect. 88. The late Earl of Mar, Marquess of Tullibardine, Earl of Linlithgow, Lord Drummond, Thomas Foster Junior, and Brigadier William Mackintosh attainted, without day given to render themselves.*

*Sect. 89. Day given in 1716 to the Earls of Marischal, Seaforth, Southesk and Penmuir, the Lords Kilsyth, Kingstone, Burleigh, Duffus, and forty-one other Persons, to render themselves, or be attainted. The like at this Time as to many Persons.*

*Sect. 90. Power to the Crown to imprison without Bail.*

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